

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

WESLEY RUSSELL, SR.

Petitioner, No. CIV S-04-2244 FCD GGH P

vs.

CHARLES PLUMMER, et al.,

Respondents. ORDER

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Petitioner is a state prisoner proceeding pro se with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On January 31, 2005, respondent filed a motion to dismiss. Because it appeared to the court that respondent had failed to serve the motion on petitioner at what was then his current address based on petitioner's latest filing on December 20, 2004 (a filing that was defective for not having been served, as noted therein), respondent was directed to file proof of service of the motion at the Deuel Vocational Institute (DVI) address petitioner had included in the latest filing even though he had not filed a formal notice of change of address in compliance with Local Rule 83-182(f). Local Rule 83-182(f) requires that a party appearing in propria persona inform the court of any address change.

Respondent was given 15 days to file proof of having re-served the motion upon petitioner at the DVI address but failed to do so. On May 19, 2005, the court issued an order

1 directing respondent to show cause, within 10 days, for the failure to file the proof of service as  
2 ordered and to show cause why the motion to dismiss should not be vacated from the court's  
3 calendar. A timely response was not forthcoming because apparently the Court Clerk failed to  
4 serve the order upon respondent until June 22, 2005. The court therefore deems respondent's  
5 June 30, 2005 response to the show cause order filed timely.

6 In the response to the show cause order, respondent indicates that petitioner was  
7 served at Avenal State Prison with the motion to dismiss after respondent's counsel's office had  
8 verified with the California Department of Corrections (CDC) that petitioner was housed there.  
9 An earlier filing of respondent's served upon petitioner at his Santa Rita County Jail address had  
10 been returned to the office of respondent's counsel. (The undersigned notes that an order served  
11 upon petitioner on December 3, 2004 at the Santa Rita address was returned to the court as well.  
12 On the other hand, the March 30, 2005 order served on petitioner at the DVI address has not been  
13 returned, nor has the May 19, 2005 order, re-served on June 30, 2005). According to respondent,  
14 the CDC indicates that, as of February 9, 2005, petitioner was placed on parole. After contacting  
15 petitioner's parole agent, respondent's office learned petitioner's current address, as of June 28,  
16 2005, was:

17 Sai Hotel-Room 19  
18 964 Howard Street  
19 San Francisco, CA 94103

20 According to respondent, that office never received the court's March 30, 2005  
21 order directing service of the motion to dismiss upon petitioner at the DVI address. Based on  
22 respondent's showing, it appears that petitioner was properly served at Avenal State Prison with  
23 the motion to dismiss, even though petitioner has never formally noticed this court of any of his  
24 changes of address. See respondent's exhibit showing petitioner's movement history.

25 Petitioner has not filed an opposition to the motion. Local Rule 78-230(m)  
26 provides in part: "Failure of the responding party to file written opposition or to file a statement  
of no opposition may be deemed a waiver of any opposition to the granting of the motion . . . ."

1 Petitioner will be granted 15 days to show cause why respondent's January 31, 2005 motion to  
2 dismiss should not be granted. Upon the expiration of that time, should petitioner fail to file and  
3 serve any opposition, along with a showing of good cause why such opposition has not been filed  
4 timely, the court will recommend that the motion be granted. Alternatively, should no response  
5 be forthcoming, the court will recommend dismissal for petitioner's failure to keep the court  
6 apprised of his current address (see Local Rule 83-182(f) and Local Rule 11-110) and for failure  
7 to prosecute this action. The court will direct that this order be served upon the current address  
8 of record, the DVI address, the Avenal State Prison address, and upon the San Francisco address.

9 Accordingly, IT IS HEREBY ORDERED that:

10 1. Respondent's June 30, 2005 response to this court's May 19, 2005 order to  
11 show cause is deemed timely and discharges the show cause order;

12 2. Petitioner must show cause for his failure to respond to respondent's January  
13 31, 2005 motion to dismiss within 15 days, as set forth above;

14 3. Failure to respond timely to this order will result in a recommendation that  
15 respondent's motion be granted; alternatively, the court will recommend dismissal for  
16 petitioner's failure to keep the apprised of his current address and for failure to prosecute this  
17 action. Local Rules 83-182(f) and 11-110:

18 4. The Clerk of the Court is directed to serve this order upon petitioner by mail at  
19 the DVI address that is the current address of record on file with this court AND upon petitioner  
20 at BOTH of the following additional addresses:

21 Avenal State Prison  
P.O. Box 8  
22 Avenal, CA 93204

Sai Hotel-Room 19  
964 Howard Street  
San Francisco, CA 94103

23 DATED: 8/3/05

24 /s/ Gregory G. Hollows

25 GREGORY G. HOLLOWNS  
26 UNITED STATES MAGISTRATE JUDGE

GGH:009

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